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No. .....



In The
# Supreme Court of the United States
October Term, 1983

RAY M. VARGAS,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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64 pp

## QUESTIONS PRESENTED

1. Whether the attorney-client relationship deprives a lawyer of his personal *Fisher*-type Fifth Amendment Privilege against self-incrimination permitting the compelled production of client files which the lawyer generated?

2. Whether the government can defeat the attorney-client and work-product privileges under the crime or fraud exception on the basis of "good faith" statements by the government attorney without any evidentiary support?

3. Whether the trial court can order the wholesale production of a lawyer's client files under the crime or fraud exception without examining the documents in those files to determine which documents relate to the alleged crime or fraud giving rise to the exception?

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The petitioner, Ray M. Vargas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 14, 1984, which affirmed a judgment of civil contempt under 18 U.S.C. § 1826.

## OPINIONS BELOW

The opinion of the Court of Appeals, filed February 8, 1984, not yet reported, appears in the Appendix hereto. A second opinion on rehearing, filed March 14, 1984, not yet reported, appears in the Appendix hereto. An earlier opinion of the Court of Appeals in the same matter, reported at 723 F.2d 1461 (10th Cir. 1983), appears in the Appendix hereto. No opinion was rendered by the District Court for District of New Mexico, but rulings from the bench appear in the Appendix hereto.

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## JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on February 8, 1984. A timely petition for rehearing and for rehearing *en banc* was filed, and on March 14, 1984, the Tenth Circuit granted the petition for rehearing, denied the petition for rehearing *en banc,* and affirmed its decision of February 8, 1984. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*United States Constitution, Amendment V*:

> . . . nor shall be compelled in any criminal case to be a witness against himself, . . .

*United States Code, Title 28*:

§ 1826. *Recalcitrant witnesses.*

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

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## STATEMENT OF THE CASE

This petition seeks review of an order entered by the District Court and affirmed by the Court of Appeals finding Petitioner in contempt of court for declining to produce his files containing work which he had personally performed on behalf of several clients. Petitioner Vargas seeks review of the rulings of the Court of Appeals in order to vindicate his good cause for nonproduction based on the Fifth Amendment, work-product, and attorney-client privileges.

Petitioner is an attorney at law licensed to practice in the State of New Mexico. He is a sole practitioner although he organized the business or financial part of his practice as a professional corporation. Mr. Vargas had represented Sangre de Cristo Community Mental Health Services, Inc. (hereinafter Sangre). He also had represented three individual clients in litigation. The fees for representing the individual clients were paid in whole or in part by Northern Community Preservation (hereinafter NCP), another nonprofit corporation. In March of 1983, Mr. Vargas was subpoenaed by the federal grand jury to produce his billings sent to Sangre and NCP for legal work during a three-year period. Vargas produced the billings as requested.

Subsequently, on March 29, 1983, a second subpoena duces tecum was served on Mr. Vargas commanding him to produce on April 19 his client files for Sangre and NCP reflecting activity since August 1, 1981. On the day before his scheduled appearance, Mr. Vargas filed a motion to quash the subpoena asserting attorney-client and work-product privileges. The Court did not rule on

the motion to quash but postponed Mr. Vargas' appearance. At the hearing on the motion, counsel for Mr. Vargas presented an affidavit numbering each document and specifying whether the attorney-client or work-product privilege applied to each. Neither privilege was claimed for some documents. The motion to quash was denied by the Honorable Juan Burciaga on the ground of prematurity. Judge Burciaga directed that Mr. Vargas appear before the grand jury, claim his privileges at that time, and thereafter the Court would review the client files *in camera* to determine whether any privilege applied.

On June 1, 1983, Mr. Vargas appeared before the grand jury. By this date, the prosecution had made it clear that Vargas was now a target of the grand jury investigation. Petitioner, therefore, asserted the attorney-client, work-product and Fifth Amendment privileges. That same afternoon, a hearing was held before the Honorable Santiago Campos who had replaced Judge Burciaga as the supervising judge for the grand jury.

Judge Campos found that the privileges were not applicable and ordered Mr. Vargas to produce his records on June 7 and informed him that he would be held in contempt of court if he did not. Judge Campos declined to review the subpoenaed records *in camera,* p. 37 of Appendix, and the prosecution did not provide an evidentiary basis for its contention that the privileges were overcome by the crime or fraud exception.

On June 7, Sangre appealed Judge Campos' order and obtained a stay from the Chief Justice of the Court of Appeals for the Tenth Circuit. Mr. Vargas filed a petition for writ of mandamus and/or prohibition which was consolidated with the direct appeal by Sangre.

On December 22, 1983, the Court of Appeals for the Tenth Circuit dismissed the appeal and denied the petition for mandamus and/or prohibition on procedural grounds. The Court ruled that in order for Mr. Vargas to obtain review of his claims of privilege on the merits, he would be required to reassert the privileges and risk contempt. The Court stated, however, that the government could establish the crime or fraud exception to the attorney-client and work-product privileges by "good faith statements" by the attorney for the government as to testimony before the grand jury. Furthermore, the Court said that an *in camera* examination of the subpoenaed documents was unnecessary to determine whether they related to the alleged crime or fraud in view of the scope of the crime or fraud alleged. A copy of that opinion (Vargas I) is attached hereto at pp. 14-30 of the Appendix.

On December 27, 1983, the grand jury issued two subpoenas to Mr. Vargas. One subpoena requested the same client files that were requested in the March 29, 1983 subpoena. The second subpoena requested the production of time slips and appointment books. Both subpoenas commanded Vargas to produce the requested records to the grand jury on January 10, 1984.

Mr. Vargas appeared before the grand jury on January 10, 1984. He declined to produce the subpoenaed documents, invoking the attorney-client, work-product and Fifth Amendment privileges. Mr. Vargas did not, however, assert the attorney-client privilege with respect to communications with Sangre because Sangre had waived its attorney-client privilege after its unsuccessful appeal.

At a hearing on January 10, 1984, Judge Campos directed Mr. Vargas to show cause why he should not be held in contempt. Mr. Vargas again asserted the attorney-client, work-product and Fifth Amendment privileges as just cause for declining to produce the subpoenaed records. Judge Campos did not review any records *in camera* to determine the applicability and scope of the privilege; nor did the government make any *prima facie* evidentiary showing that the privileges were inapplicable because of the crime or fraud exception. An Assistant United States Attorney summarized the results of the grand jury investigation in support of the crime or fraud exception to the attorney-client and work-product privileges.

The District Judge ruled that although Vargas was a sole practitioner, he could not rely on his Fifth Amendment Privilege under *Fisher v. United States,* 425 U.S. 391 (1976), to avoid production of documents which he personally prepared or acquired in the course of representing his clients. The District Judge based his ruling solely on the ground that the required records exception to the Fifth Amendment extends to an attorney's files, including attorney-client communications and work-product, generated in the course of an attorney's representation of a client who has received federal grant monies.

The District Court further ruled that Petitioner Vargas could not avail himself of the attorney-client and work-product privileges because of the crime or fraud exception to both privileges. The District Court accepted the government's allegations of wrongdoing without any evidentiary showing. The District Court did not review the documents to determine which, if any, might be sub-

ject to the crime or fraud exception, but instead ordered their wholesale production. The text of the District Court's findings and rulings are set forth at pp. 31-35 of the Appendix.

Mr. Vargas filed a notice of appeal at the conclusion of the hearing. Finding that the appeal was neither frivolous nor taken for delay, Judge Campos released Mr. Vargas on the condition that the subpoenaed documents be placed under seal with the clerk of the court without waiver of the asserted privileges.

The Court of Appeals for the Tenth Circuit affirmed the judgment of contempt. The opinion adopted a unique rationale that was neither briefed nor argued by the parties. First, the Court of Appeals disposed of Vargas' Fifth Amendment claim by holding that an attorney holds his legal files in a representative capacity for his clients, that his clients own them, and that the attorney has no Fifth Amendment privilege to refuse production, even though the act of production might be incriminatory and testimonial with respect to the attorney. The Court did not deny that production in this case would be both testimonial and incriminatory but held that since the attorney's files generated in the course of his representation were "owned" by the client, the attorney holds them in a representative capacity for the client. Second, the Court ruled that the work-product privilege applied only to material prepared in anticipation of litigation and that despite the absence of a finding by the district court that the files were not so prepared, it would assume that the district court intended to use that reason as a basis for

denying the privilege.[1] The Court held that despite the absence of any review of the files by the Court *in camera* or otherwise, the district court must have thought that they were not prepared in anticipation of litigation. Third, the Court did not purport to address the attorney-client or work-product privileges with respect to the files for the clients for whom NCP funded litigation. The Court's opinion appears at pp. 1-10 of the Appendix.

Mr. Vargas filed a petition for rehearing and for rehearing *en banc*. Without requesting additional briefs or scheduling oral argument, the same panel which decided the appeal in this case affirmed its decision of February 8, 1984.

The opinion on rehearing was entered March 14, 1984. The Court held that this Court's recent opinion in *United States v. Doe,* 52 U.S.L.W. 4296 (Feb. 28, 1984), did not involve papers held in a representative capacity and that since an attorney holds his client files as a representative for the client, their production was not protected by the rule announced in *Fisher v. United States,* 425 U.S. 391, 413, n.14 (1976). The Court also affirmed the District Court's ruling that the work-product privilege and the attorney-client privilege were inapplicable due to the crime or fraud exception. In addition, the Tenth Circuit upheld the procedure used by the District Court for determining whether the crime or fraud exception has been established by the government. This procedure uncritically accepted the "good faith" statements by the govern-

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1. The Court apparently overlooked the affidavit of Mr. Vargas' attorney clearly specifying the documents for which a work-product privilege pertained.

ment prosecutor, without any supporting evidence, and found that the crime or fraud exception to the attorney-client and work-product privileges had been established. The District Court made this finding without inspecting the subpoenaed documents *in camera* to determine whether the documents related to the alleged crime or fraud. A copy of the Court of Appeals decision on rehearing appears at pp. 11-13 of the Appendix.

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## REASONS FOR GRANTING THE WRIT

**1. The decision below conflicts with the decisions of this Court concerning the right of a person to assert the Fifth Amendment privilege against self-incrimination with respect to the production of documents.**

This Court has held that the Fifth Amendment privilege against compulsory incrimination applies to documents where the compelled act of production may be both testimonial in nature and incriminating. *Fisher v. United States,* 425 U.S. 391 (1976). This Court recently reaffirmed the *Fisher*-type of self-incrimination privilege in *United States v. Doe,* — U.S. — (No. 82-786, 1984), although this Court rejected a Fifth Amendment privilege for the contents of business records whose preparation was not compelled.

The Fifth Amendment privilege against self-incrimination applies under *Fisher, supra,* and *Doe, supra,* to documents of " . . . the sole proprietor or sole practitioner. . . ." *Bellis v. United States,* 417 U.S. 85, 88 (1974). Indeed, in *United States v. Doe, supra,* this Court applied

the *Fisher*-type privilege to the documents of a sole proprietor of several business companies.

A. The Tenth Circuit has here held that a lawyer has no Fifth Amendment privilege under *Fisher* with respect to documents in his files containing work which he personally performed on behalf of his clients. See p. 9 of Appendix hereto. In reliance upon what it conceived to be the basis of this Court's decision in *Bellis v. United States, supra,* the Tenth Circuit ruled that ownership rights in such files belong to the clients rather than the attorney and that the attorney holds his client files in a representative capacity for the clients. See p. 7 of Appendix hereto.

In so holding, the Tenth Circuit did not reject Mr. Vargas' claim that the compelled production of his documents would be both testimonial and incriminating. Nor did the Tenth Circuit reject the finding of the District Court that Mr. Vargas is a "sole practitioner." See p. 33 of Appendix hereto. Instead, the Tenth Circuit held that Mr. Vargas had no standing to rely upon the Fifth Amendment in the *Fisher* and *Doe* contexts because he held his files in a representative capacity for his clients.

The Tenth Circuit's reliance upon *Bellis v. United States,* 417 U.S. 85 (1974), to deny standing to Mr. Vargas to raise his Fifth Amendment privilege misreads *Bellis.* The "representative capacity" principle in *Bellis,* upon which the Tenth Circuit relied, applies only in the context of an organization or institutional entity of which the person holding records is a member. Relying upon *United States v. White,* 322 U.S. 694 (1944), this Court in *Bellis* held that the Fifth Amendment protects only natural persons and not artificial organizations or entities.

417 U.S. at 89-90. Therefore, this Court in *Bellis* emphasized that the Fifth Amendment privilege cannot be asserted by a person holding an organization's records in a representative capacity because the organization itself has no Fifth Amendment privilege.

The "representative capacity" limitation on the Fifth Amendment privilege,

> . . . only makes sense in the context of . . . [an] "organized institutional activity." . . . This analysis presupposes the existence of an organization which is recognized as an independent entity apart from its individual members. 417 U.S. at 92.

The Tenth Circuit lifted the "representative capacity" language of *White* and *Bellis* and applied it in a context where it makes no sense. The lawyer as sole practitioner does not hold his files in a representative capacity for an organization which has no Fifth Amendment privilege. Moreover, the lawyer who asserts his Fifth Amendment privilege with respect to his files claims the Fifth Amendment protection as a personal privilege; he does not assert the privilege of an organization or of a client. The decision of the Tenth Circuit thus applied the "representative capacity" language out of context and perverted the *Bellis* and *White* limitation on the Fifth Amendment by applying it to a professional relationship where its rationale has no application. Indeed, this Court in *Bellis* recognized that even where an attorney practices law in an organizational entity the individual lawyer may be able to assert his personal Fifth Amendment privilege with respect to his files containing his work on behalf of his clients. 417 U.S. at 98, n. 9.

B. The Tenth Circuit's opinion also conflicts with this court's decision in *Couch v. United States,* 409 U.S.

322 (1972). The Court of Appeals grounded its "representative capacity" doctrine on ownership rather than possession. The Court of Appeals stated that any ownership rights in a lawyer's client files belong to the client. According to the Tenth Circuit, because the client *owns* the files, the attorney holds the files in a representative capacity for the client.

This Court in *Couch* expressly rejected ownership as a basis for determining the availability of the Fifth Amendment privilege against self-incrimination. In *Couch*, the client's records were held by an accountant who was subpoenaed to produce them. This Court rejected the client's claim of a Fifth Amendment privilege, making possession rather than ownership the controlling factor.

> Petitioner would, in effect, have us read Boyd to mark ownership, not possession, as the bounds of the privilege, despite the fact that possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment. To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line. It would hold here that the business records which petitioner actually owned would be protected in the hands of her accountant, while business information communicated to her accountant by letter, conversations in which the accountant took notes, in addition to the accountant's own work papers and photocopies of petitioner's records, would not be subject to a claim of privilege since title rested in the accountant.

409 U.S. at 331.

The Court of Appeals' decision conflicts with *Couch* in two major respects. First, the opinion ignores this Court's clear ruling that title to the accountant's work papers and photocopies of client documents rests in the

accountant. The client does not own the files created by a lawyer. A lawyer is a professional who works as an independent contractor, and not as an employee of the client. The client brings the attorney legal problems, not client files. Second, *Couch* makes actual possession of the files "the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime." 409 U.S. at 334. Where the attorney is accused of a crime, and the attorney possesses documents which he generated in the course of representing his clients, a subpoena directing him to produce the document in his possession implicates his personal Fifth Amendment privilege.

By relying on an ownership theory to support its "representative capacity" doctrine, the Tenth Circuit directly contradicts the holding in *Couch*. Furthermore, resurrection of the ownership theory would give clients the benefit of Fifth Amendment protection for documents in the possession of independent contractors such as lawyers, doctors, and accountants. At the same time, the ownership theory adopted by the Court of Appeals would deny the privilege to independent professionals who create client files, including research, factual analysis, and strategy alternatives regarding their clients. The documents created by the attorney are both owned and possessed by him and are protected by the Fifth Amendment if the requirements of *Fisher* and *Doe* are met.

These conflicts with decisions of this Court justify the grant of certiorari to review the judgment below.

**2. The decision below conflicts with the decisions of other courts of appeal on the right of a person to assert the Fifth Amendment privilege against self-incrimination with respect to the compelled production of documents.**

A. The Court of Appeals for the Tenth Circuit has here construed *United States v. White,* 322 U.S. 694 (1944), and *Bellis v. United States,* 417 U.S. 85 (1974), to mean that a lawyer's files containing work performed on behalf of his client are owned by the client and that the lawyer holds his files in a representative capacity for the client. See p. 7 of Appendix hereto. In so holding, the Tenth Circuit's interpretation of *Bellis* and *White* conflicts with decisions in the Second, Third, Fifth, Ninth and Eleventh Circuits which apply *Bellis* to deny a Fifth Amendment privilege only where there is an organization or entity for whom a member is holding the documents in a representative capacity. See, e.g., *United States v. Fox,* 721 F.2d 32 (2d Cir. 1983); *Matter of Grand Jury Empanelled March 19, 1980,* 680 F.2d 327 (3d Cir. 1982), affirmed *sub. nom. United States v. Doe,* — U.S. — (No. 82-786-decided February 28, 1984); *United States v. Meeks,* 719 F.2d 809 (5th Cir. 1983); *United States v. Alderson,* 646 F.2d 421 (9th Cir. 1981); *Hishon v. King and Spalding,* 678 F.2d 1022 (11th Cir. 1982). For example, the Fifth Circuit applied *Bellis* to a situation where the person to whom the subpoena was directed held documents on behalf of a corporation. *United States v. Meeks, supra.* The Ninth Circuit held that *Bellis* precluded a Fifth Amendment privilege claim where partnership documents were held in a representative capacity.

No federal circuit except the Tenth in this case has construed *Bellis* to defeat the Fifth Amendment privilege

where a person holds documents which do not belong to an organizational entity. *Bellis* applies where a person holds papers of an organization or entity such as a partnership, corporation, trust, estate, none of which has a Fifth Amendment privilege. The Tenth Circuit's application of the *White* and *Bellis* rule to the attorney-client relationship conflicts with the interpretation of *Bellis* in the other circuits.

B. The Tenth Circuit decision denying the Fifth Amendment privilege to an attorney sole practitioner also conflicts with the decisions of the other federal circuits which permit a sole practitioner or sole proprietor to assert his Fifth Amendment privilege with respect to documents in his possession. See, for example, *In Re J. Doe, M.D.*, 711 F.2d 1187 (2nd Cir. 1983) (medical sole practitioner); *Matter of Grand Jury Empanelled March 19, 1980,* 680 F.2d 327 (3d Cir. 1982), affirmed *sub. nom. United States v. Doe,* — U.S. — (No. 82-786, decided February 28, 1984)) (sole proprietor); *In re Grand Jury, United States v. Kent,* 646 F.2d 963 (5th Cir. 1981) (sole proprietor); and *United States v. Plesons,* 560 F.2d 890 (5th Cir. 1977) (medical sole practitioner).

The Tenth Circuit in this case is the only federal circuit to deny the Fifth Amendment privilege to a sole practitioner or proprietor. By holding that an attorney holds his client files in a representative capacity, the Tenth Circuit strips the professional sole practitioner who renders services on behalf of clients or patients of his Fifth Amendment protection. Other circuits, in particular the Second and Fifth Circuits, afford the sole practitioner the right to assert his Fifth Amendment privilege against self-incrimination with respect to his patient files. *In Re*

*J. Doe, M.D.*, 711 F.2d 1187 (2d Cir. 1983); *United States v. Plesons*, 560 F.2d 890 (5th Cir. 1977). No circuit, other than the Tenth, has deprived a sole practitioner of a *Fisher*-type privilege on the ground that he holds his patient or client files in a "representative capacity." Thus, the conflict between the decision below and the decision in *Dr. Doe* and *Plesons* is complete and irreconcilable.

C. The decision of the Tenth Circuit in this case conflicts with the Second Circuit's opinion in *In Re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983*, 722 F.2d 981 (2d Cir. 1983). The Second Circuit held that where compelled production of documents is protected by the Fifth Amendment privilege under *Fisher v. United States, supra*, the representative capacity doctrine in *Bellis* does not apply, even when the documents subpoenaed are corporate documents. Because *Fisher* protects one from implicitly admitting possession of documents by the act of producing them in response to a subpoena, possession of corporate documents in an individual capacity does not preclude assertion of the Fifth Amendment privilege notwithstanding *Bellis*. Thus, the Second Circuit upheld the invocation of the *Fisher*-type privilege where possession was a critical issue and a former officer of a corporation possessed corporate records which he removed after leaving the corporation's employ.

The Tenth Circuit here applied *Bellis* to deny a lawyer the right to assert his Fifth Amendment privilege under *Fisher* where possession was a critical issue. See p. 3 of Appendix hereto. If the act of producing documents, whose existence or possession is in issue, might incriminate the possessor by proving the fact of existence for possession, the Second Circuit permits the possessor to

assert his personal Fifth Amendment privilege under *Fisher,* notwithstanding *Bellis.* In contrast, the Tenth Circuit relies on *Bellis* to deny the possessor the right to assert his Fifth Amendment privilege under *Fisher.* The decision below, therefore, directly conflicts with the decision of the Second Circuit in *In Re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983.*

D. The Tenth Circuit's ruling that an attorney's client files are owned by the client and that the attorney holds them in a representative capacity for the client conflicts with the Second Circuit's decision in *In Re J. Doe, M.D.,* 711 F.2d 1187 (2nd Cir. 1983). The Second Circuit held that a medical doctor could assert his Fifth Amendment privilege under *Fisher* with respect to his patient files unless they were "required records." Although the Second Circuit did not expressly address the ownership of the patient files and the nature of the medical doctor's possession of those files, the decision held that the patient files were subject to a *Fisher* claim of privilege. The Tenth Circuit, on the other hand, denied a Fifth Amendment privilege claim under *Fisher* with respect to client files even though such files were not subject to the required records exception to the Fifth Amendment.

These conflicts justify the grant of certiorari to review the judgment below.

**3. The decision below conflicts with the decisions of other courts of appeals as to the procedure required for determining whether the crime or fraud exception to the attorney-client and work-product privileges has been established by the government.**

This Court recognizes an exception to the federal attorney client privilege when a communication which would

otherwise be protected is made for the purpose of furthering a crime or fraud. *Clark v. United States,* 289 U.S. 1 (1933). This Court held that a mere charge of wrongdoing without more was insufficient to defeat the privilege.

> To drive the privilege away, there must be "something to give colour to the charge;" there must be prima facie evidence that it has some foundation in fact.

*Clark v. United States,* 289 U.S. 1 at 15.

A. The Tenth Circuit has here held that good faith statements by the attorney for the government as to testimony already received by the grand jury, without any supporting evidence, is sufficient to meet the test in *Clark* for establishing the crime or fraud exception to the attorney-client and work product privileges. See pp. 28-29 of Appendix hereto. Relying upon this decision of the Tenth Circuit, the District Court found that the government had presented a *prima facie* foundation by the good faith representations of the attorney for the government. See pp. 32-33 of Appendix hereto. On appeal, the Tenth Circuit affirmed the District Court's ruling that the crime or fraud exception had been established. See p. 13 of Appendix hereto.

Although other federal circuits have not expressly rejected the procedure adopted here by the Tenth Circuit, none has directly addressed the particular procedure approved by the Tenth Circuit because the Tenth Circuit's ruling represents a substantial departure from the rule in *Clark* that there must be evidence with a foundation in fact in order to establish the crime or fraud exception. By permitting the government to establish this exception to the attorney-client and work-product priv-

ileges on the basis of a prosecutor's "good faith" statements without any evidentiary support in the form of affidavits or transcripts of grand jury proceedings, the Tenth Circuit's opinion conflicts not only with the other federal courts of appeals but also with the directive of this Court in *Clark*.

The decisions of the other circuits which have approved the government's *prima facie* showing of the crime or fraud exception all have involved more than the allegations by the government attorney concerning the results of a grand jury investigation. For example, the District of Columbia Circuit in *In Re Sealed Case*, 676 F. 2d 793 (D.C. Cir. 1982), stated that, "The government's showing is sufficient if it proffers evidence that, if believed by a trier of fact, would establish the elements of some violation. . . ." 676 F.2d at 815. Further, the court noted that the government's "allegations were supported by affidavits and portions of the transcripts of various witnesses' testimony before the grand jury." 676 F.2d at 813, n. 82. Likewise, the Fifth Circuit in *In Re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026 (5th Cir. 1982), noted that the government made such a showing by presenting evidence of an express agreement to furnish bail and legal expenses for conspirators who were apprehended by law enforcement officials. The Seventh Circuit in *In Re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980), found that the evidence in the form of grand jury documents submitted by the attorney for the government established a *prima facie* showing of fraud. Similarly, the Second Circuit in *In Re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982), reviewed and upheld prima facie showings based on grand jury testimony, affidavits, and other evi-

dence; and the Eighth Circuit in *In Re Berkley & Co., Inc.*, 629 F.2d 548 (8th Cir. 1980), affirmed a determination by the trial court that the crime or fraud exception had been established on the basis of documentary evidence. No other circuit has countenanced the deprivation of the attorney-client and work-product privileges on mere allegations of the attorney for the government without any evidentiary submission to establish the good faith of the prosecutor's representations.

B. The Tenth Circuit also upheld the District Court's order that the crime or fraud exception required production of Mr. Vargas' entire client files even though the District Judge refused to examine the documents *in camera* to determine whether any document related to the alleged crime or fraud. See p. 37 of Appendix hereto. The Court of Appeals assumed that all of the documents in the client files were related to the crime or fraud alleged by the attorney for the government and, therefore, did not require the District Court to conduct an *in camera* inspection of the documents. See p. 29 of Appendix hereto.

In holding that good faith statements by the prosecutor were sufficient to overcome the attorney-client and work-product privileges and that an *in camera* inspection of documents is unnecessary to insure that documents unrelated to the alleged crime or fraud are not disclosed, the Tenth Circuit has sanctioned a procedure that conflicts with the procedure in every other circuit. No other Court of Appeals has permitted the attorney-client and work-product privileges to be overcome in the absence of an *in camera* inspection of the subpoenaed documents and

on the basis of good faith statements by the government prosecutor.

The District of Columbia Circuit requires an *in camera* inspection of the subpoenaed documents as part of the procedure for determining whether the documents were made with respect to or in furtherance of a crime or fraud. *In re Sealed Case,* 676 F.2d 793 (D.C. Cir. 1982). The court held that a two-step procedure is required to establish the crime or fraud exception. First, there must be a *prima facie* showing of a crime or fraud. "Second, the court must find some valid relationship between the work product under subpoena and the *prima facie* violation." 676 F.2d at 814-815. The court assumed that an *in camera* inspection of the subpoenaed documents is essential to make a finding that the documents reasonably relate to the subject matter of the possible violation. 676 F.2d at 815. Indeed, the District Court inspected *in camera* the subpoenaed documents, 676 F.2d at 804, and the Court of Appeals approved the District Court's finding that the documents were reasonably related to the *prima facie* crime or fraud. 676 F.2d at 815-816.

At least two other circuits have affirmed the District Court's determination where it conducted an *in camera* examination. The Eighth Circuit in *In Re Berkley & Co.,* 629 F.2d 548, 553 (8th Cir. 1980), noted that the District Court found that 19 of the several hundred documents related to the fraudulent schemes. Similarly, in *In Re Grand Jury Proceedings,* 604 F.2d 798 (3d Cir. 1979), the District Court determined that the government had made a *prima facie* showing of a crime after reviewing the subpoenaed documents *in camera.* No federal circuit, other than the Tenth Circuit, has sanctioned the whole-

sale production of voluminous files on the ground that the documents contained in the files are not privileged without examining them *in camera* to determine whether the documents relate to the *prima facie* showing of a crime or fraud.

These conflicts justify the grant of certiorari to review the judgment below.

**4. The decision below raises significant and recurring problems concerning efforts to invoke the Fifth Amendment, attorney-client, and work-product privileges.**

The Tenth Circuit's opinion in this case implicates important constitutional and policy questions growing out of *bona fide* efforts to invoke the Fifth Amendment privilege against self-incrimination and the attorney-client and work-product privileges. Government efforts to subpoena documents from lawyers is a common, if not increasing occurence, and both litigants, and the lower courts urgently need the guidance of this Court in determining the availability of these important privileges. The Tenth Circuit's opinion raises the following important questions:

(A) Is the Fifth Amendment privilege against self-incrimination under *Fisher* with respect to documents unavailable to lawyers or other professionals simply because such professionals work on behalf of clients or patients? A sole practitioner of medicine, law, or accountancy is entitled to the same Fifth Amendment protection as any other sole proprietor. *Bellis v. United States,* 417 U.S. 85, 88 (1974). He certainly is entitled to as much protection for his client's or patient's file as a businessman is for his business records. The Fifth Amendment does not discriminate on the basis of occupa-

tion. The Tenth Circuit's decision strips attorneys, and by logical extension, accountants and doctors, of any right to assert a *Fisher*-type Fifth Amendment privilege with respect to production of client files in their possession. In essence, the decision deprives an entire class of professionals of a Fifth Amendment right by taking the notion of "representative capacity" in the organizational context and importing it into the attorney-client relationship.

(B) Should *Couch v. United States,* 409 U.S. 322 (1972), be overruled to make the availability of the Fifth Amendment privilege with respect to documents turn on ownership rather than on possession? This Court held in *Couch* that possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment and rejected ownership as the determinative factor. The Tenth Circuit's opinion resurrects ownership as the critical factor. If ownership is determinative, as the Tenth Circuit held, any person with title to documents can assert a Fifth Amendment claim against their compelled production from another who possesses them. Furthermore, the ownership criterion would effectively incorporate the vagaries of state property law into the Fifth Amendment. The availability of the Fifth Amendment could, therefore, vary from state to state. This Court should definitively resolve the issue of whether ownership or possession is the determinative factor in the application of the Fifth Amendment, particularly in the context of a professional's work papers generated in the course of his services to clients or patients.

(C) Should the government be able to overcome the attorney-client privilege by merely alleging wrongdoing

on the part of the client or attorney without offering evidence in support of the allegations? This Court has recently reaffirmed the importance of the attorney-client privilege in our system of justice. *Upjohn Co. v. United States,* 449 U.S. 383 (1981). This privilege is properly unavailable when attorney-client communications are used to further a crime or fraud. *Clark v. United States,* 289 U.S. 1 (1933). To establish this exception, this Court held that mere assertions of wrongdoing were insufficient and that the government must submit *prima facie* evidence that shows the charge of wrongdoing has some foundation in fact. *Clark, supra.*

More than fifty years have passed since this Court's decision in *Clark.* The number of federal cases construing the *Clark* decision reflects increasing reliance on the crime or fraud exception to the attorney-client privilege. It is time for this Court to reexamine this exception, particularly in light of the procedures utilized by the lower courts in determining whether the crime or fraud exception has been established so as to overcome the important attorney-client privilege. To the extent that the procedures permit the government to defeat the privilege without an evidentiary showing, the attorney-client privilege becomes illusory. On the other hand, adoption by this Court of required procedures designed to enhance the reliability of the factual determination involved in deciding whether the exception defeats the privilege will serve both to secure the values of the privilege and to avoid misuse of the privilege.

Finally, the correctness of the decision below is open to serious question. The refusal of the Tenth Circuit to

afford a sole practitioner of law the protection of the Fifth Amendment privilege against self-incrimination cannot be justified. *See Fisher v. United States,* 425 U.S. 391 (1976); *Couch v. United States,* 409 U.S. 322 (1972); and *Bellis v. United States,* 417 U.S. 85 (1974). Furthermore, the decision of the Tenth Circuit affirming a finding that the crime or fraud exception overcomes the attorney-client and work-product privileges on a record of "good faith statements" by the attorney for the government is wrong. See *Clark v. United States,* 289 U.S. 1 (1933).

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## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

WILLIAM S. DIXON
R. RAYMOND TWOHIG, JR.
LEO M. ROMERO

*Counsel for Petitioner*

April 27, 1984

**APPENDIX A**

No. 84-1058

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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IN RE: GRAND JURY PROCEEDINGS

RAY M. VARGAS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(Oral Order entered January 10, 1984)

(Filed February 8, 1984)

Leo M. Romero (William S. Dixon and R. Raymond Twohig, Jr. with him on the brief), Albuquerque, New Mexico, for Appellant.

William L. Lutz, United States Attorney (Richard J. Smith, Assistant U. S. Attorney, with him on the brief), Albuquerque, New Mexico, for Appellee.

(Brief of Amicus Curiae, urging reversal, was filed by Dan A. McKinnon, III, of Marron, McKinnon & Ewing, and Michael B. Browde, Albuquerque, New Mexico, on behalf of the State Bar of New Mexico.)

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Before McWILLIAMS, McKAY and SEYMOUR, Circuit Judges.

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McKAY, Circuit Judge.

This is an appeal from a final Order of the District Court in which the appellant, Ray M. Vargas, was cited

for contempt of court and ordered confined. His confinement was stayed pending resolution of this appeal. Mr. Vargas, an attorney, was cited for contempt for refusing to produce the files of his client, Sangre de Cristo, Community Mental Health Service, Inc., to the grand jury. The grand jury is investigating fraud involving federal government grants of which Mr. Vargas' client is a recipient. The government has asserted that appellant Vargas is himself a target of the grand jury investigation in connection with allegedly false or excessive billings to his client.

The matter was before us previously when both the attorney and the client challenged the subpoena. *See In re Grand Jury Proceedings* (*Vargas*), Nos. 83-1691 and 83-1836 (10th Cir. Dec. 22, 1983) *("Vargas I")*. There we declined to reach the merits of the subpoena duces tecum's validity because the appeal was premature. We also found that the principles of mandamus and prohibition were not properly invoked. Since that time, the client, Sangre de Cristo, has dropped its resistance to the subpoena and directed Mr. Vargas to turn its files over to the grand jury. After further review and the attorney's refusal to surrender the records, the trial court held the attorney in contempt. This timely appeal followed that order.

The appeal is governed by the 30-day provision of 28 USC 1826(b).[1]

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1. Section 1826(b) provides:

§ 1826. Recalitrant Witnesses

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for

(Continued on next page)

Appellant raises two arguments on appeal. First, he argues that, as an attorney, the production of his client files before the grand jury violates his fifth privilege under *Fisher v. United States,* 425 U.S. 391 (1976). Second, Mr Vargas alleges that his client files are protected by the attorney work-product privilege.[2] We reject both of appellant's assertions.

The primary focus of appellant's first argument is that compulsory surrender of the client's files would be an incriminating act since his possession of those files would form a significant link in the government's proof of fraudulent billings for work actually or purportedly done by him for the client.

The general principle is established in *Fisher v. United States,* 425 U.S. 391 (1976), where the Court recognized that

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(Continued from previous page)

> his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, *but not later than thirty days from the filing of such appeal.*

28 U.S.C. § 1826(b) (1976) (emphasis supplied). This circuit has held this 30-day rule to be mandatory and it cannot be extended by this court. In re Berry, 521 F.2d 179, 181 (10th Cir.), *cert. denied,* 423 U.S. 928 (1975). *Contra* In re Fula, 672 F.2d 279 (2nd Cir. 1982); Melickan v. United States, 547 F.2d 416 (8th Cir.), *cert. denied,* 430 U.S. 986 (1977).

2. Mr. Vargas initially claimed production of his client files was protected by the attorney-client privilege. However, since his client, Sangre de Cristo, has now waived the attorney-client privilege, Mr. Vargas does not raise it on this appeal. We, therefore, need not decide the applicability of the crime or fraud exception to the attorney-client privilege in this case. *See Vargas I* Nos. 83-1691 and 83-1836, slip. op. at 11-12 (10th Cir. Dec. 22, 1983).

> [t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer.[3]

The *Fisher* court qualified this principle by stating that although the act of production had its own communicative aspects, it was doubtful that an admission of the existence and possession of certain papers rose to the level of "testimony" protected by the 5th Amendment. *Id.* at 411. While we share the concerns raised by Judge Friendly[4] in *In re Dr. Doe*, 711 F.2d 1187 (1983), and

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3. 425 U.S. at 410. In *Fisher*, taxpayers under investigation for possible civil or criminal liability under the federal income tax laws transferred documents prepared by their respective accountants to their respective attorneys for assistance with the federal investigation. The Internal Revenue Service sought to subpoena these documents from the attorneys. The attorneys refused to comply. After the government brought enforcement actions, the taxpayers asserted inter alia that production of the documents by their attorneys violated the taxpayers' fifth amendment rights. The Court held that the taxpayers' privilege under the fifth amendment was not violated by enforcing the subpoenas against their attorneys, since the taxpayer was not "compelled" to do anything, not be a "witness" against himself. *Id.* at 396-97.

4. Judge Friendly, concurring in the Second Circuit's decision that the fifth amendment privilege was not available to a doctor's production, pursuant to subpoena, of patient files he was required to keep by law, expressed the concern that the Supreme Court has left unanswerable the question of "how a person can be ordered consistently with the language of the self-incrimination clause to produce . . . (documents before a grand jury) under circumstances when he cannot be required to testify about such dealings. . . ." In re Dr. Doe, 711 F.2d 1187, 1196 (1983).

Judge Knapp[5] in *United States v. Karp*, 484 F. Supp. 157 (S.D. N.Y. 1980), we believe that an analysis of the Supreme Court cases directed to the production of evidence other than oral testimony indicates that the fifth amendment privilege in this regard is very weak. Not only has the Court refused to extend the privilege to the custodian of corporate documents or those belonging to other collective entities such as unions and partnerships, *see Fisher*, 425 U.S. at 411, but it has refused to apply the privilege to a substantial list of other things, of which the act of production would be incriminating in the same sense that the production of these records would be. *See, e.g., South Dakota v. Neville*, — U.S. —, 103 S. Ct. 916, 923 (1983) (compelling blood-alcohol test not fifth amendment violation); *United States v. Dionisio*, 410 U.S. 1, 5-7 (1973) (compelling production of voice exemplars not fifth amendment violation); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (compelling production of handwriting exemplars not fifth amendment violation); *Schmerber v. California*, 384 U.S. 757, 765 (1966) (compelling blood test not fifth amendment violation); *Bolt v. United States*, 218 U.S. 245, 252-53 (1910) (compelling defendant to try on clothes to demonstrate fit not fifth amendment violation).

We must also view the general principle of *Fisher* in light of the Court's opinion in *Bellis v. United States*, 417 U.S. 85 (1974). In *Bellis* the documents subpoenaed were the books and records of a small law partnership.

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5. Judge Knapp, in denying the government's motion to compel the defendant's production of third-party documents in his possession, aptly described the role of the federal courts in discerning the present state of the law surrounding the fifth amendment privilege as that of a tea leaves reader. See United States v. Karp, 484 F. Supp. 157, 158 (S.D.N.Y. 1980).

The Court held that because the individual partner held the partnership records in a representative capacity for the partnership, he could not assert a fifth amendment privilege with reference to those documents. *Id.* at 100-01. The thrust of the Court's analysis was that fifth amendment assertions have to focus on the surrender of property which is "the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." *Id.* at 90 (quoting from *United States v. White,* 322 U.S. 694, 699 (1944)).

The Court in *Bellis* did indicate that "[a] different case might be presented if petitioner had been ordered to produce files containing work which he had personally performed on behalf of his clients, even if these files might for some purposes be viewed as those of the partnership." 417 U.S. at 98 n.9. The case which the Court explicitly left open in that footnote is now before us.

While the Court in *Bellis* was dealing with documents relating to the internal management of the law firm, its repeated emphasis was on the absence of an ownership interest, and the representative capacity in which the petitioner in that case held the property. *See id.* at 88-90. The Court supported its holding by noting that the petitioner was accountable to the partnership as a fiduciary, that the other partners at all times had access to the partnership books, and that the other partners in the firm could enforce their rights by demanding production of the records in a suit for a formal accounting. 417 U.S. at 99. The Court similarly emphasized the nature of the documents as being subject to the rights of others and not subject to the exclusive control of the person to whom the subpoena was issued.

Whereas the partner in *Bellis* held documents in a representative capacity for the partnership, the attorney in this case holds the client file in a representative capacity for the client. Any ownership rights which inure in the file belong to the client who has presumably paid for the professional services and preparations made by the attorney. In this regard, we find client files to be indistinguishable in principle from the kinds of files which the Court found not subject to the fifth amendment privilege in *Bellis*. So far as we can determine, it is a general principle of law that client files belong to the client and indeed the court may order them surrendered to the client or another attorney on the request of the client subject only to the attorney's right to be protected in receiving compensation from the client for work done. *See, e.g.*, Restatement (Second) of Agency § 464(b) (1957) and Restatement of Security § 62(b) (1941). *See also Prichard v. Fulmer*, 22 N.M. 134, 159 P. 39 (1916) (New Mexico's recognition of the common law principle of attorneys' retaining and charging liens). The attorney's interest is only that of a retaining lien[6] and his interest at best is a pecuniary one, not an interest of ownership, nor privacy.

Indeed, if the analysis of an expectation of privacy plays any part in the Court's analysis in *Bellis*, it could hardly be said that the attorney has an expectation of privacy in the client's files at least against a claim of the

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6. The retaining lien enables the attorney to retain a client's records or other property that has come into the attorney's possession until the client pays for all of the legal fees owing to the attorney. *See, e.g.*, In re Southwest Restaurant Sys., Inc., 607 F.2d 1243 (9th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980); United States v. J.B.W. & Gitlitz Deli & Bar, Inc., 499 F. Supp. 1010 (S.D.N.Y. 1980).

client for production or surrender of those files. This is not to say that an attorney has no privacy interest in his work product. Rather, whatever privacy interests an attorney may have, they are limited to those established under the work-product immunity doctrine of *Hickman v. Taylor,* 329 U.S. 495, 510-512 (1947), and its progeny.

*Hickman,* however, is expressly limited to those matters relating to the lawyer's mental processes developed explicitly for litigation. 392 U.S. 495 at 510-12. The *Hickman* doctrine was designed to protect a lawyer against his adversary taking advantage of his efforts. Analytically, except for that limitation, a client has some rights in those processes because the client has paid for those labors and efforts. In the case before us, even the *Bellis* Court's indication that a "preexisting relationship of confidentiality", 417 U.S. at 101, might present a different case does not apply because of the client in the case before us has surrendered any claim of confidentiality and explicitly directed the attorney to surrender the records to the grand jury.

We can find no way to distinguish in principle records which are held by a lawyer for his client from records held by a lawyer for his small partnership. Both held such records in a representative capacity for another individual or collective entity and as such are not in possession of the documents in a purely personal capacity. *See United States v. White,* 322 U.S. 694, 699 (1944) ("the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession they are in a purely personal capacity"). "[I]ndividuals, when acting as representatives . . . cannot be said to be exercising their personal

rights," *id*, and thus we need not reach the issue of whether an attorney juridically organized as a professional corporation, as distinguished from a partnership or sole proprietorship, is entitled to the protections of the fifth amendment on the basis of his or her legal status. As the Third Circuit indicated in *Matter of Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 330 (3d Cir. 1982), *cert. granted sub nom. United States v. Doe*, — U.S. —, 103 S. Ct. 1890 (May 2, 1983):

> [I]n *Bellis* . . . the Supreme Court made it clear that, in evaluating a fifth amendment claim, the critical factor was not the *size* of the organization the records of which were being subpoenaed, but rather the *nature* of the capacity—either personal or representational—with respect to the privilege which was claimed.

Since the client files are held by Mr. Vargas in a representational capacity, the assertion of the fifth amendment privilege in this case must fail. We limit our holding today to the situation where, as here, the client has directed the attorney to turn the client file over to the grand jury pursuant to the subpoena.

Appellant's second assertion that these files are protected under the work-product immunity doctrine must likewise fail. As we have noted, the *Hickman* doctrine protects only that which was prepared in preparation for litigation. The work-product privilege does not apply to documents subpoenaed by a grand jury where such documents were not prepared for the client in anticipation of litigation. *In re Grand Jury Subpoena Duces Tecum*, 697 F.2d 277 (10th Cir. 1983).

Prior to our decision in *Vargas I* and subsequent thereto, appellant asserted before the trial judge his

claim of work-product privilege. In both instances the trial court found the privilege inapplicable. The trial court made no finding that the work performed by Mr. Vargas for his client was in preparation of litigation. Although the trial court's findings were not explicit, they must stand inasmuch as appellant has not demonstrated that the trial court's findings were clearly erroneous or that the trial court employed an erroneous legal standard.

In view of the fact that the client has waived the attorney-client privilege, and that the only other privileges asserted by appellant are precluded as we have indicated, the decision of the trial court is affirmed.

**APPENDIX B**

SLIP OPINION

*Publish*

No. 84-1058

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

IN RE: GRAND JURY PROCEEDINGS
RAY M. VARGAS,

*Petitioner-Appellant,*

v.

UNITED STATES OF AMERICA,

*Respondent-Appellee.*

ON REHEARING OF APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(Oral Order entered January 10, 1984)

(Filed March 14, 1984)

Submitted on the briefs:

William S. Dixon of Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico; R. Raymond Twohig, Jr., of Deaton & Twohig, Albuquerque, New Mexico; and Leo M. Romero, Albuquerque, New Mexico, for Petitioner-Appellant.

William L. Lutz, United States Attorney, and Richard J. Smith, Assistant United States Attorney, District of New Mexico, Albuquerque, New Mexico, for Respondent-Appellee.

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Before McWILLIAMS, McKAY and SEYMOUR, Circuit Judges.

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McKAY, Circuit Judge.

Petitioner, Ray M. Vargas, requests that this panel rehear the case of *In re Grand Jury Proceedings (Vargas)* ("Vargas II") No. 84-1058 (10th Cir. Feb. 8, 1984). The petition for rehearing and the Government's response have been carefully considered. The petition for rehearing before this panel is granted. No member of the panel nor judge on regular active service on the court has requested that the court be polled on rehearing in banc. *See* Rule 35, Federal Rules of Appellate Procedure. Therefore, the suggestion for *rehearing in banc is denied.* Additionally, since the trial court has issued a stay of enforcement of the order of confinement pending petitioner's application to the Supreme Court of the United States for writ of certiorari, that part of the petition requesting recall and stay of the trial court's mandate is moot.

We affirm the decision of *Vargas II* with the following addendum.

Since the filing of this petition the Supreme Court has decided *United States v. Doe,* 52 U.S.L.W. 4296 (U.S. Feb. 28, 1984) (contents of sole proprietor's voluntarily prepared business records not protected by fifth amendment's privilege against compelled self-incrimination). While *Doe* clearly recognizes that the production of personal papers may be a testimonial act protected by the fifth amendment, that case does not involve papers held by one in a representative capacity. *Id.* at 4298-99. As the Supreme Court made clear in *Fisher v. United States,* 425 U.S. 391, 413 & n.14 (1976), even though the produc-

tion of papers held in a representative capacity may be a testimonial act, such production is not protected by the fifth amendment.

Petitioner requests that this court direct its attention to other clients who could be impacted by the subpoena and who have not waived the attorney-client privilege. In *Vargas I, In re Grand Jury Proceedings (Vargas),* Nos. 83-1691 and 83-1836 (10th Cir. Dec. 22, 1983), we set forth the standards to be employed by the trial court when determining the application of the crime or fraud exception to the attorney-client or work-product privileges. *Vargas I,* slip. op. at 11-13. The trial court in *Vargas II, In re Grand Jury Proceedings (Vargas),* No. 84-1058 (10th Cir. Feb. 8, 1984), applied those standards and found that a prima facie case had been made as to the application of the crime or fraud exception to both privileges. Record, vol. 2, at 29-32. The trial court found that as to Mr. Vargas' other clients the attorney-client privilege was not applicable under the furtherance of the crime or fraud exception and that in conformity with the standards set out by this court in *Vargas I* the work-product privilege did not apply. *Id.* at 30.

As this court has held, "[t]he determination of whether the government shows a prima facie foundation . . . lies in the sound discretion of the trial court." *In re September 1975 Grand Jury Term,* 532 F.2d 734, 737 (10th Cir. 1976). A review of the trial court's proceedings clearly reveals that the standards set out in *Vargas I* were followed by the trial court. Thus, there was no abuse of discretion by the trial court.

AFFIRMED.

## APPENDIX C

In re Grand Jury Proceedings, Subpoena to Ray M. VARGAS.

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SANGRE DE CRISTO COMMUNITY MENTAL HEALTH SERVICE, INC.,

Appellant,

v.

UNITED STATES of America,

Appellee.

Ray M. VARGAS,

Petitioner,

v.

Santiago CAMPOS, United States District Judge,

Respondent.

Nos. 83-1691, 83-1836.

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United States Court of Appeals,
Tenth Circuit.

Dec. 22, 1983.

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James L. Brandenburg and Leo Romero, Albuquerque, N.M., for appellant and petitioner.

William L. Lutz, U.S. Atty., Albuquerque, N.M., for appellee and respondent.

Before McWILLIAMS, McKAY and SEYMOUR, Circuit Judges.

McKAY, Circuit Judge.

This case concerns a Petition for Writ of Mandamus and/or Prohibition by an attorney and an appeal by his client, a community health center, from an order of the district court pursuant to a subpoena duces tecum that the attorney turn over to a federal grand jury his client files for the community health center and another corporation.

In March 1983, the attorney was subpoenaed by a federal grand jury to produce his billings to the community health center and another nonprofit corporation. The attorney complied with that request. Subsequently, on March 29, 1983, a second subpoena duces tecum was served on the attorney commanding him to produce on April 19 his client files for the community health center and the nonprofit corporation reflecting the services provided by the attorney since August 1, 1983. The basis of that subpoena was the government's allegation that the attorney, the community health center and the nonprofit corporation were involved in a common scheme to use public grant monies for their private gain.

On April 18, one day before the attorney was to appear, he filed a motion to quash the subpoena, asserting attorney-client and work-product privileges. On April 28, the community health center moved to intervene and join the motion to quash. The motion to quash was denied

by Judge Burciaga. He instructed the attorney to appear before the grand jury on June 1 with his records. If at that time the attorney still claimed a privilege the clerk of the court would seal the records and the judge would review them in camera. The community health center did not attempt to appeal Judge Burciaga's order.

On June 1 the attorney appeared before the grand jury with no records and refused to answer anything other than his name. He also asserted a fifth amendment privilege regarding the records. On that afternoon a hearing was held before Judge Campos, who had replaced Judge Burciaga as the supervising judge for the grand jury. The community health center attorney was excluded from that hearing and its continuation on June 6 because grand jury matters and testimony were to be discussed.

Judge Campos again reviewed the attorney's claims of attorney-client privilege, work-product privilege and fifth amendment privilege. Finding that those privileges were not applicable under the facts before him, Judge Campos ordered the attorney to produce the records on June 7 before the grand jury and informed the attorney that if he failed to do so he would be held in contempt.

On June 7 the community health center filed an appeal from Judge Campos' order and obtained a stay of that order from this court. That stay went into effect before the attorney was required to produce the records. Thus, he was never held to be in contempt. Subsequently the attorney filed a Petition for Writ of Mandamus and/or Prohibition directing that the order be vacated pending final disposition of the community health center's appeal.

Before addressing the arguments raised concerning the attorney-client, work-product and fifth amendment

privileges, we must first determine whether either the community health center or the attorney is properly before this court. We will first address that inquiry with regard to the community health center's appeal.

I.

[1, 2] Ordinarily only a party who has been aggrieved by an order or judgment of a district court may appeal that decision. *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 333, 100 S.Ct. 1166, 1171, 63 L.Ed.2d 427 (1980). There is some question as to whether the community health center is such a party. Although it filed a motion to intervene and join in the attorney's motion to quash, record vol. 1, at 17, there is no indication in the record that the motion was ever ruled upon. Despite the absence of any indication that the motion was granted, the community health center participated in the hearing on May 2, 1983, before Judge Burciaga dealing with the initial motion to quash and was initially present at the hearing before Judge Campos and was asked to leave only because grand jury testimony was going to be discussed. Record, vol. 3, at 4 and 8. Consequently, we consider it to be a party to the proceedings before both Judge Burciaga and Judge Campos and entitled to appeal from any appealable decision or order.

[3] An order to appear before a grand jury pursuant to a subpoena duces tecum, however, is ordinarily an interlocutory order and not appealable, at least not by the witness. *United States v. Ryan,* 402 U.S. 530, 532-33, 91 S.Ct. 1580, 1581-82, 29 L.Ed.2d 85 (1971). Recognizing that rule, the community health center and the attorney argue that the exception to the general rule, established in *Perlman v. United States,* 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918), is applicable in the case at bar.

The parties have not cited and we have not found any decisions where this circuit has applied the *Perlman* exception to the final judgment rule. Accordingly, a discussion of that exception and its scope is appropriate.

Perlman was a witness in a patent infringement case. At trial he offered into evidence documents and exhibits which belonged to him relating to his invention which was the subject of the suit. Pursuant to granting the plaintiff's motion to dismiss without prejudice, the trial court ordered that the exhibits be impounded and sealed, and kept in the custody of the clerk of the court. Subsequently the clerk of the court was ordered to turn the exhibits over to a grand jury and to provide the United States Attorney reasonable access to the exhibits. Perlman, claiming fourth and fifth amendment privileges, petitioned to restrain the clerk from releasing the exhibits. The petition was denied and Perlman appealed. The government moved to dismiss the appeal because the order was interlocutory. The Supreme Court held that Perlman would be "powerless to avert the mischief of the order" if he were not allowed to appeal the order. 247 U.S. at 13, 38 S.Ct. at 419[1]

Subsequent Supreme Court cases have not defined the scope of the exception established in *Perlman*. In fact, the rationale for the exception has changed with time.[2] The most recent pronouncements of the Supreme Court, however, have noted that Perlman falls "within the 'limited

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1. The Supreme Court, however, ruled against Perlman on the merits.

2. For a discussion of the history and application of the *Perlman* exception see *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174, 178-79 (2nd Cir. 1979).

class of cases where denial of immediate review would render impossible any review whatsoever of an individual's clams.'" *United States v. Nixon,* 418 U.S. 683, 691, 94 S.Ct. 3090, 3099, 41 L.Ed.2d 1039 (1974) (quoting *United States v. Ryan,* 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971)).

Several circuits have read that language broadly and have concluded that

> when a subpoena is directed to a person who has custoday of material as to which another person may claim a privilege of non-disclosure, the person who holds the privilege may seek immediate review of the disclosure order. The justification for permitting immediate appeal under these circumstances is that the privilege-holder has no power to compel the custodian of the material to risk a contempt citation for his refusal to comply with the court's order. Thus, denying the holder of the privilege the right to immediate review would leave him "powerless to avert the mischief of the order. . . ."

*Branch v. Phillips Petroleum Co.,* 638 F.2d 873, 878 n.3 (5th Cir. 1981); *accord e.g., In re International Horizons, Inc.,* 689 F.2d 996, 1001 (11th Cir. 1982); *In re Berkley and Co.,* 629 F.2d 548, 551 (8th Cir. 1980).

Nevertheless, a minority of circuits have construed the exception more narrowly emphasizing the policies behind the final judgment rule and the nature of the relationship between the party subpoenaed and the party possessing the privilege. *In re Sealed Case,* 655 F.2d 1298 (D.C.Cir.1981) (attorney-client, not immediately appealable); *In re Oberkoetter,* 612 F.2d 15 (1st Cir. 1980) (attorney-client, not immediately appealable); *National Super Spuds, Inc. v. New York Mercantile Exchange,* 591 F.2d 174 (2d Cir. 1979) (employer-employee, not immediately

appealable). We find these cases well reasoned and more persuasive in light of the facts of the case at bar.

To understand the appropriateness of an exception to a general rule, it is necessary first to understand the rule itself.

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. . . . To be effective judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice.

*Cobbledick v. United States,* 309 U.S. 323, 324-25, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940). Consequently, "one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its command or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." *United States v. Ryan,* 402 U.S. 530, 532, 91 S.Ct. 1580, 1581, 29 L.Ed.2d 85 (1971).

[4, 5] The policies that require a witness to risk a contempt citation before being able to appeal a motion to quash apply with equal force to a third party. Thus, the third party is entitled to immediate appeal only when "denial of immediate review would render impossible any review whatsoever of [the third party's] claims. *United States v. Nixon,* 418 U.S. at 691, 94 S.Ct. at 3099 (quoting *United States v. Ryan,* 402 U.S. at 533, 91 S.Ct. at 1582). We conclude that a third party whose attorney has been

subpoenaed is not in a position such that denial of immediate review "renders impossible any review whatsoever," at least in the context of the case at bar.

Generally an attorney might be expected to defy a court order and risk contempt to preserve his client's interests and prove his reliability as an advocate. *In re Oberkoetter,* 612 F.2d 15, 18 (1st Cir. 1980). Thus, the situation in the case at bar is very different from *Perlman* where there was no probability that the clerk of the court would risk a contempt citation for an unrelated third party.[3]

[6] Furthermore, the facts in the case at bar indicate that the client will have its rights protected. While the attorney has claimed the attorney-client privilege which belongs to the client, he has also claimed the work-product privilege and the fifth amendment privilege against self incrimination, privileges which are personal to the attorney. Consequently, the attorney in the case at bar will be motivated to risk contempt and must risk contempt to protect his own privileges in addition to the reasons that would motivate him to risk contempt for his client.

In addition, to allow an appeal in a case such as this invite collusion between atttorneys and their clients. It would be unwise to let attorneys avoid the rules of finality by allowing their clients to carry their banner and receive

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3. *Perlman* can also be distinguished on the ground that in *Perlman* the privileges claimed were of constitutional dimension. Here we are dealing with the common law attorney-client privilege. *Oberkoetter,* 612 F.2d at 18.

immediate review when the attorney alone would be unable to do so.

Accordingly, we hold that this case is not within that "limited class of cases where denial of immediate review would render impossible any review whatsoever." *See In re Sealed Case,* 655 F.2d 1298, 1301 (D.C. Cir. 1981). Thus, the appeal by the community health center is premature. Before it can appeal from Judge Campos' order, it must await a contempt citation against its attorney or be able to prove that the attorney will produce the records rather than risk contempt.

[7-9] Our holding does not leave clients in general without remedy. If the trial judge has clearly abused his discretion clients can seek a writ of mandamus without having to wait for a contempt citation. *National Super Spuds, Inc. v. New York Mercantile Exchange,* 591 F.2d 174, 181 (2d Cir. 1979). Furthermore, because an attorney cannot waive the attorney-client privilege without the client's consent, *Republic Gear Co. v. Borg Warner Corp.,* 381 F.2d 551, 556 (2d Cir. 1967), production of privileged documents by an attorney under court order does not necessarily constitute a waiver of the privilege.[4] *Trans-*

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4. This concept is reflected in proposed rule 512 of the Federal Rules of Evidence. Rule 512 provides: "Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege." Fed.R. Evid. 512 (not enacted). Although Congress did not enact rule 512, it still has utility as a standard of law on the privileges that should be applied in federal courts. J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 501[03] at 501-26 to 501-28 (1982) and cases cited therein.

*america Computer Co. v. International Business Machines Corp.*, 573 F.2d 646, 651 (9th Cir. 1978); *Teachers Insurance and Annuity Assoc. v. Shamrock Broadcasting Co.*, 521 F.Supp. 638, 641 (S.D.N.Y. 1981); cf. *United States v. Fusaro*, 708 F.2d 17, 25 n. 3 (1st Cir. 1983).

Accordingly, the community health center's appeal is dismissed. Conceivably its appeal could be construed as a petition for a writ of mandamus. The propriety of such a writ will be discussed in conjunction with the petition of the attorney which is also before this court.

II.

[10] Petitioner here does not challenge the well established rule that one cannot appeal the denial of a motion to quash a subpoena duces tecum but must be cited for contempt if he wishes to challenge the validity of the subpoena. *United States v. Ryan*, 402 U.S. 530, 532, 91 S.Ct. 1580, 1581 (1971). Therefore, the attorney seeks a writ of mandamus or prohibition to, in essence, review the propriety of the subpoena. A writ of mandamus is a drastic remedy "to be invoked only in extraordinary situations." *Allied Chemical Corp. v. Daiflon Inc.*, 449 U.S. 33, 34, 101 S.Ct. 188, 189, 66 L.Ed.2d 193 (1980). In particular, "[i]t is clear mandamus may not be used as a substitute for appeal." *United States v. Martinez*, 667 F.2d 886, 891 (10th Cir.), *cert. denied*, 456 U.S. 1008,101 S. Ct. 2301, 73 L.Ed.2d 1304 (1982). Consequently, the attorney "must show that no other adequate relief is available and that his right to the writ is clear and indisputable. The right to the writ is clear and indisputable when the petitioner can show a judicial usurpation of power or a clear abuse of discretion."

*United States v. West,* 672 F.2d 796, 799 (10th Cir. 1982) (citations omitted).

Neither the attorney nor the client have shown any action taken by the trial court that would amount to a judicial usurpation of power or a clear abuse of discretion with regard to any of the claimed privileges.

[11-14] The petitioner claims that the trial court usurped its power by finding that the attorney-client privilege was not applicable. The privilege does not apply where the client consults an attorney to further a crime or fraud. *Clark v. United States,* 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933). Petitioner correctly argues that the government must do more than allege that an attorney is a target of a grand jury investigation to vitiate the privilege. Before the privilege is lost "there must be '*prima facie*' evidence that [the allegation of attorney participation in a crime or fraud] has some foundation in fact." *Id.* Petitioner, however, argues that certain procedures must be followed, including an opportunity for the attorney and client to rebut the prima facie evidence and to be present at any hearing which is intended to establish such a prima facie foundation. Record, vol. 1, at 22-24; Brief of Appellant at 16-17. Petitioner misconstrues the law in this circuit. As this court held in its opinion *In re September 1975 Grand Jury Term,* 532 F.2d 734 (10th Cir. 1976), "[t]he determination of whether the government shows a prima facie foundation in fact for the charge which results in the subpoena lies in the sound discretion of the trial court." *Id.* at 737. In particular, that determination can be made ex-parte and a "preliminary minitrial" is not necessary. *Id.* at 737-38. Furthermore, the prima facie

foundation may be made by documentary evidence or good faith statements by the prosecutor as to testimony already received by the grand jury. After reviewing the record it appears that the government may have presented sufficient prima facie evidence to the trial court, but inasmuch as the trial court did not expressly make such a determination we do not reach that issue. Nevertheless it is clear that there was no abuse of discretion.[5]

[15] Petitioner also alleges that the trial court abused its discretion in not ordering an in camera inspection of the records. However, once the trial judge has concluded that the privilege does not apply because the government has made such a prima facie showing, the trial court need only conduct an in camera inspection of the documents if there is a possibility that some of them may fall outside the scope of the exception to the privilege. After reviewing the scope of the subpoena issued and the nature of the allegations concerning the attorney's involvement, we believe that the scope of the exception to the attorney-client privilege in the case at bar would be sufficiently broad to cover all of the documents requested if the trial court determies that the government has made a prima facie showing as stated above.

[16] The preceding analysis applies to both the attorney-client and work-product privileges. *Id.* at 738. Thus, we now turn to petitioner's final allegation of abuse of discretion, the trial court's rejection of his claim of

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5. Likewise the trial court did not abuse its discretion when it excluded counsel for the community health center from the hearings on June 1 and June 6 when grand jury matters were being discussed. *See In re September 1975 Grand Jury Term*, 532 F.2d 734, 737 (10th Cir. 1976).

fifth amendment privilege. After reviewing the record and petitioner's arguments, we find that petitioner has presented no grounds for invoking our mandamus jurisdiction with regard to the fifth amendment claim.

The attorney also claims in his petition that it is proper for a writ to issue to aid the jurisdiction of this court because of the clent's pending appeal in the same matter. Inasmuch as we have herein dismissed the client's appeal as premature we need not address that argument.

[17, 18] Writs of prohibition, like writs of mandamus, are not to be used as a substitute for appeal. *Erie Bank v. United States District Court for District of Colorado,* 362 F.2d 539, 540 (10th Cir. 1966). Similarly a writ of prohibition is a drastic and extraordinary remedy which should be granted only when the petitioner has shown his right to the writ to be clear and undisputable and that the actions of the court were a clear abuse of discretion. *Texas Gulf Sulphur Co. v. Ritter,* 371 F.2d 145, 146-47 (10th Cir. 1967). Petitioner has not met that burden.

Thus, the Petition for Writ of Mandamus and/or Prohibition is denied and the appeal by the community health center is dismissed.

## APPENDIX D

Misc. No. 6312

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

In re: Federal Grand Jury Subpoena
No. 83-1

TRANSCRIPT OF PROCEEDINGS
JANUARY 10, 1984

BE IT REMEMBERED, that on to-wit, the tenth day of January, 1984, this matter came on for hearing before the HONORABLE SANTIAGO E. CAMPOS, United States District Judge, for the District of New Mexico, before Julie R. Baston, Deputy Official Reporter, at the United States District Courthouse, Albuquerque, New Mexico, comencing at the hour of three-thirty in the afternoon.

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(page 29) Mr. Smith: Your Honor, I see no need to rehash in detail or restate in detail the Government's position. We've pointed out why we believe the attorney-client privilege is inapplicable and why we believe the work-product privilege is inapplicable as well, and that theory centers on the crime of fraud exception to those privileges, and I don't think we need to belabor that point.

The Tenth Circuit indicates that they feel, looking at the record, that an adequate prima facie showing was made and that we didn't ask and the Bench did not feel called upon to make such a finding. We would ask now that such a finding be made if the Court feels it appropriate to do so.

With reference to the Fifth Amendment claim, the cases cited in our briefs to this Court in June indicate that a law practice organized as Mr. Vargas' is is simply not the place where that Fifth Amendment privilege attaches. We simply stand on the arguments we've made to the Court prior to this occasion and urge that the Court find Mr. Vargas to be presently in contempt of court.

The Court: Anything further, Mr. Romero?

Mr. Romero: May I have one second, please?

The Court: Yes, sir.

Mr. Romero: We have nothing further, your Honor.

The Court: All right. I will find that the (page 30) attorney-client privilege has been waived insofar as Sangre de Cristo Community Mental Health, Inc. is concerned, and that privilege has been waived by the Chairman of the Board of that corporation and a member of the Board of Directors.

I will further find that a prima facie case has been made under the standards set forth in this case before the Court of Appeals in its opinion which came down just very recently in the matter of in Re: Grand Jury Proceedings, Subpoena of Ray M. Vargas. Sangre de Cristo Community Mental Health Services, Inc., Appellant vs. The United States of America, Appellee. Ray M. Vargas, Petitioner vs. Santiago Campos, United States District Judge, Numbers 83-1691 and 83-1836.

The attorney-client privilege insofar as Northern Community Preservation, Inc. is concerned is not applicable under the furtherance of a crime of fraud exception to the

privilege. I will find that, again in conformity with the criteria set forth in the case before the Court of Appeals, that the prima facie case has been made on the good faith statements by the prosecutor as to the testimony already received by the Grand Jury.

I will find, also in conformity with the criteria in that case, that the work-product privilege does not apply. I will find and conclude that the Fifth Amendment right in self-incrimination does not protect Mr. Vargas from the (page 31) production demanded under the two subpoenas in this case, H-1 and H-2. And the authorities upon which I rely to support by conclusion in that regard are, amongst other cases, United States vs. Mandujano, 425 US 564, United States vs. Doe, 541 Federal 2d 490, Bellis vs. United States, 417 US 85, In Re: Grand Jury Proceedings, 601 Federal 2d 162. Matter of Berry, 521 Federal 2d 176, a Tenth Circuit case.

I would note that the records which are demanded under the two subpoenas here are records which relate to the institutional activity of the two organizations whose records are sought, and they are not records which relate to the individual, these are not the personal records of Mr. Vargas.

I would note that while Mr. Vargas according to the affidavit which has been presented here is a sole practitioner, that nevertheless there is an exception to the Fifth Amendment right where the records called for are required records, that is, records required to be kept and In Re: Grand Jury Proceedings, 601 Federal 2d 162, Tenth Circuit, in reference to that holds that the sole practitioner rule does not apply for so-called required records.

The Court there stated "While natural persons need not produce their personal papers, their Constitutional protection does not extend to required records, records required by law to be kept in order that there may be suitable information of transactions which are the (page 32) appropriate subjects of governmental regulations and the enforcement of restrictions validly established. This limit on the Constitutional exemption has been explained on the basis that the public interest in obtaining such information outweighs the private interest opposing disclosure, and the further rationale that such records become tantamount to public records."

Here we have records which relate to the financial activities of these two organizations which are funded by public funds, and although I can't cite you chapter and verse, I'm certain that the law is, and it exists, and there are statutes or regulations which require an accounting of these public funds and those are records that are required to be kept, and that takes the case out of the sole practitioner rule, in my opinion.

All right. I will further find that the defendant, even though he is a target of this investigation, has willfully refused to respond to the production called for by the two subpoenas in question, H-1 and H-2, and will therefore find that the defendant is in willful contempt of this Court under the provisions of 28 USC 1826.

Mr. Vargas, will you please come forward and I will impose the sanctions which this Court feels are appropriate in this case. This is a most distasteful thing of course for me, but I feel it encumbant upon the Court to (page 33) make certain that the processes of this Court are

obeyed, and I feel that you have willfully disobeyed the subpoenas of this Court and will find you in contempt.

I will order that you be incarcerated in the Bernalillo County Detention Center until such time as you purge yourself of the contempt by compliance with the two subpoenas, H-1 and H-2, or until this Grand Jury is discharged, whichever event occurs sooner.

Any statement by Counsel at this time?

Mr. Romero: Yes, your Honor. We would at this time move for release pending appeal and we would submit this motion and would submit a memorandum in support of our motion for release pending appeal.

The Court: My impression is that I must now examine into the question as to whether the appeal is frivolous. Is this correct?

Mr. Romero: That is correct, your Honor.

The Court: All right. Let me read your memorandum and then I will call upon the Government to respond in reference to your request. You may be seated.

Mr. Smith or Mr. Lutz, in regard to the motion for release pending appeal, what would you say?

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## APPENDIX E

MISC. NO. 6312

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE:

SUBPOENA TO RAY M. VARGAS

RE: GRAND JURY NO. 83-1

TRANSCRIPT OF PROCEEDINGS

JUNE 6, 1983

BE IT REMEMBERED, that on to-wit, the sixth day of June, 1983, this matter continued on for hearing before the HONORABLE SANTIAGO E. CAMPOS, United States District Judge, for the District of New Mexico, before Betty J. Lanphere, Official Reporter, at the United States District Courthouse, Santa Fe, New Mexico, commencing at the hour of five o'clock in the afternoon.

* * *

(page 14) Mr. Twohig: Your Honor, you indicated, I wouldn't want to be thought of as acquiescing on this point, you indicated you were basing your decision in part upon the Bellis case, and I will refer the Court to footnote 9 of that case.

That footnote specifically indicates that a different case than Bellis would be presented if petitioner were ordered to produce files containing work which he had personally performed on behalf of his client.

The specifically accepted that particular category of work from the Bellis decision and of course, that is the category we have here.

The Court: All right. Your remarks are noted. Anything further?

Mr. Twohig: I think there is only one other thing I need to clarify.

In the hearing before Judge Burciaga, when he denied our motion to quash subpoena, he indicated that his purpose in doing so was to proceed in a different procedural fashion.

He wanted to look at each document to determine whether, in camera, to determine whether the attorney-client privilege applied to it or not or whether work product applied to it or not.

The Court: I do not propose to undertake that (page 15) procedure in this case.

Mr. Twohig: Very well, your Honor, I just want the record to be clear that we do request that procedure and the Court declined to do so.

Now, would the Court in entering this order permit us to proceed on interlocutory appeal and make the finding necessary for interlocutory appeal?

The Court: No, I doubt that I would because the Grand Jury, this Grand Jury, as I understand it, would or will cease to exist at the end of this month.

Mr. Lutz: No, sir, the Grand Jury —

The Court: Don't we have a different Grand Jury coming in at the end of the month?

Mr. Lutz: No, this is the Grand Jury that will proceed through approximately 13 months.

The Court: That's what you informed me at the other hearing, but I just talked to Mr. Casaus and he informed me that a Grand Jury, a new Grand Jury was convening on the 28th.

Now, however, this particular Grand Jury will continue with the investigation which touches this matter beyond June 28th?

Mr. Lutz: Yes, sir. This Grand Jury was convened I think in December of '82.

* * *